

Rudman v Deane

2012 NY Slip Op 33629(U)

May 23, 2012

Sup Ct, New York County

Docket Number: 650159/10

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
J.S.C.
Justice

PART 54

Rudman

INDEX NO.

650159/10

MOTION DATE

- v -
Deane et al

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

36, 36-1, 2, 3,
50,
51

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in
accordance with the amended
decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/23/12

SHIRLEY WERNER KORNREICH
J.S.C.

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
HARVEY RUDMAN and HAROLD KUPLESKY,
on Behalf of Each of Them Individually and
on Behalf of Starrett City Preservation LLC,
Derivatively,

Plaintiffs,

Index No. 650159/2010
DECISION and ORDER

-against-

CAROL GRAM DEANE, THE ESTATE OF
DISQUE D. DEANE by CAROL G. DEANE,
as TEMPORARY EXECUTRIX, SALT
KETTLE LLC, ST. GERVAIS LLC, and
STARRETT CITY PRESERVATION LLC,
DD SPRING CREEK LLC, SK SPRING
CREEK LLC, SPRING CREEK PLAZA
LLC, DD SHOPPING CENTER LLC and
SK SHOPPING CENTER LLC,

Defendants.

-----X

KORNREICH, SHIRLEY WERNER, J.:

Defendant Spring Creek Plaza LLC (Spring Creek) moves to dismiss the second amended complaint, pursuant to CPLR 3013, 3016 (b), and 3211 (a) (7). The second amended complaint asserts claims for aiding and abetting breaches of fiduciary duty and for conversion as against Spring Creek (and a group of other defendants). Additionally, plaintiffs Harvey Rudman (Rudman) and Harold Kuplesky (Kuplesky), individually and on behalf of nominal defendant Starret City Preservation LLC, seek, *inter alia*, a declaration that certain assignments or transfers made to Spring Creek, are ineffective.¹

¹ At oral argument, plaintiffs withdrew their seventh and eighth causes of action for tortious interference with contract, as against Spring Creek. *See* transcript of oral argument, at

The claims in this action arise out of the refinancing of the Starrett City housing complex in Brooklyn. Plaintiffs assert that defendants violated the terms of a management incentive agreement designed to provide management, including plaintiffs, an economic incentive to assist the general partners of Starrett City Associates LP (SCA), the limited partnership that owns Starrett City, achieve a sale or refinancing of the property. A sale or refinancing would have allowed the partners of SCA to access equity that had built up in Starrett City since its acquisition decades earlier. For the following reasons, the motion is granted.

I. Factual Background

Unless otherwise indicated, the following facts are drawn from the second amended complaint (SAC) and exhibits annexed thereto.

A. Starrett City

SCA is the beneficial owner of Starrett City, a highly regulated, mixed income residential housing complex located in Brooklyn. Prior to a refinancing transaction that closed in December 2009, Starrett City was a building complex comprised of 46 buildings housing 12,000 residents. It was located on 140 acres with extensive facilities, including a shopping center. SCA, has hundreds of partners, mostly limited partners, who have residual economic interests in SCA. Rudman and Kuplesky were principal members of the entities that managed the day-to-day operations of Starrett City on behalf of SCA.

Disque Deane (Disque), personally and later through a wholly owned entity, defendant DD Spring Creek LLC (DD/SCA), was the managing general partner (MGP) of SCA since 1985. The other general partner of SCA has been a series of entities controlled by Carol Deane (Carol),

Disque's wife, and owned by entities controlled by the Deane family -- defendant Salt Kettle LLC (SKI) until mid-December 2009 and defendant SK Spring Creek LLC (SK/SCA) thereafter.

According to plaintiffs, Carol has been an integral participant in the conduct of the general partners of SCA for years, particularly since Disque suffered a stroke in 2004. For example, Carol served as the co-chairperson of the managing general partner of SCA. Carol also is the manager of SKI, the President of SK/SCA, and the operating manager and a member of defendant St. Gervais LLC, the sole member of SKI. As reflected in the amended caption, since Disque's death on November 8, 2010, Carol has served as the temporary executrix of his estate and, as a result, is the decision maker for the Deane-controlled entities. *See* Stipulation and Order Substituting Party and Amending Caption, entered on February 24, 2011, Doc. no. 34.

B. Spring Creek

Movant – Spring Creek – was formed in November 2009 for the purpose of accepting the transfer of certain assets from SCA. As discussed further below, the “shopping center”, the “vacant land parcels” and more than \$3.5 million in cash were transferred from SCA to Spring Creek as part of the December 2009 refinancing.

Spring Creek has three members, all of which were formed in November 2009: defendant DD Shopping Center LLC (DD/Shopping), the managing member of Spring Creek; defendant SK Shopping Center LLC (SK/Shopping), and SC LP Shopping Center LLC (LP/Shopping). Disque is the sole member of DD/Shopping. DD/Shopping is the sole member of LP/Shopping, who acts on behalf of the limited partners of SCA, and SKI, a general partner of SCA, is the sole member of SK/Shopping. Carol initially was the Vice-President of Spring Creek and is now the President.

The residual economic interests in Spring Creek were distributed to the limited and general partners of SCA in the same proportion as their residual economic interests in SCA. Thus, DD/Shopping holds a 1% interest in Spring Creek, which corresponds to the Managing Partner's 1% interest in SCA. SK/Shopping holds an 18.9% interest in Spring Creek, which corresponds to SKI's and, later, SK/SCA's, 18.9% general partner interest in SCA. LP/Shopping, representing the limited partners, owns the balance.

C. *The Alleged Scheme*

Plaintiffs allege that Disque and Carol devised a scheme, beginning in 2000, to maintain control over Starrett City in the face of increasing discontent by the SCA limited partners with Disque's ability to serve as General Managing Partner. The scheme also would increase the Deanes' ownership share of Starrett City and all of its assets. At the time, SCA was seeking to unlock, through a sale or refinancing, the equity that had built up in Starrett City since its development decades earlier.

To achieve their goals, the Deanes announced that if Disque remained as Managing Partner, they would create a management incentive program, funded by the general partners, that would offer a number of individuals, including plaintiffs, a chance to benefit economically from a sale or refinancing. The Deanes knew that, having served for decades in key management positions, Rudman and Kuplesky were viewed by the limited partners and other professionals associated with SCA, as competent and objective. Both plaintiffs had a high level of institutional knowledge about the financing, regulation, legal structure and facilities of Starrett City. The Deanes convinced the limited partners of SCA to increase the general partners' share of the residual interest in Starrett City from 10% to 19.9% by promising to use this increase to fund the

management incentive program.

D. The Preservation Agreement and Omnibus Assignments

The vehicle for implementing the management incentive program was a limited liability company known as Starrett City Preservation LLC (Preservation). The Limited Liability Company Agreement of Preservation (the Preservation Agreement), was executed on January 1, 2006. The Deane family owned 61.73% of the membership interests in Preservation, and the management team (comprised of plaintiffs Rudman, Kuplesky and a third individual) owned the remaining 38.27%.² Carol is the managing member of Preservation.

As set forth in Section 1.7 of the Preservation Agreement, the MGP and SKI assigned to Preservation “the MGP Interest, the SKI Interest and all payments payable by SCA to the MGP and SKI in respect thereof” Further, it states that “MGP and SKI confirm to [Preservation] that they shall not transfer any amount of the MGP Interest or the SKI Interest (or any part thereof) to a transferee.”

Concurrent with the execution of the Preservation Agreement, the general partners (Disque and SKI, by Carol) executed written assignments (the Omnibus Assignments) by which the general partners assigned their 19.9% combined residual interest in SCA to Preservation. The assignment provided by Disque states that he assigns to Preservation “all right, title and interest of [his] economic interest, as [MGP], in Starrett City Associates . . . including all right, title and interest in any payments and distributions made or to be made to [Disque] in his capacity as the [MGP] of SCA” The Omnibus Assignment provided by SKI contains virtually

² As set forth in exhibit A to the Preservation Agreement, Rudman has 15.01 % of the membership shares, and Kuplesky and a third individual each have 11.63% of the membership shares.

identical language. Preservation is identified as a limited partner of SCA in SCA's tax filings and internal records, without specifying its percentage interest.

E. The December 2009 Refinancing and Defendants' Failure To Meet Obligations to Plaintiffs

On December 17, 2009, after years of effort, a refinancing transaction closed. The transaction had various components: (i) a 10 year loan by Wells Fargo in the amount of approximately \$531,485,000; (ii) \$79 million of the loan proceeds were set aside for capital improvements and other reserves, most of which, once invested, would increase the equity base of the complex by that amount; (iii) SCA received regulatory authorization to pay annual distributions of up to 10% (rather than the prior regulatory limit of 6%) of the increased equity base to its limited and general partners; and (iv) a religious site that was part of Starrett City was released from housing regulations and donated to a charitable organization to the benefit of SCA. Additionally, the shopping center portion of Starrett City and seven undeveloped parcels of land that were part of Starrett City were released from housing regulations. This permitted their sale or development.

The shopping center and seven parcels of land were conveyed by SCA to the newly-formed Spring Creek. Also, in excess of \$3.5 million from the cash proceeds of the refinancing was transferred to Spring Creek. Due to these transfers, Preservation alleges it did not receive the economic interests to which it was entitled under the Preservation Agreement and corresponding Omnibus Assignments and, therefore, Rudman and Kuplesky have been damaged.

After this action was commenced, Spring Creek donated the vacant land parcels, valued at \$53.9 million, to a charitable organization in exchange for a charitable tax deduction worth

\$53.9 million.³ These allegations, as well as Spring Creek's alleged refusal to deliver the general partners' (or their affiliates') share of the assets that were previously assigned to Preservation, are the basis for plaintiffs' claims against Spring Creek.

II. Discussion

In deciding a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and give the plaintiff the benefit of every favorable inference. *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005). However, "allegations consisting of bare legal conclusions as well as factual claims either inherently or flatly contradicted by the documentary evidence are not entitled to such consideration." *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 (1st Dept 1995).

CPLR 3013 requires that claims be pleaded with sufficient particularity "to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3016 (b) further requires that, for certain claims, including for breach of trust, "the circumstances constituting the wrong shall be stated in detail."

A. Aiding and Abetting Breach of Fiduciary Duty (2nd C/A)

A claim for aiding and abetting a breach of fiduciary duty must be dismissed absent allegations that defendant enabled a breach of fiduciary duty by providing "substantial assistance." See *Kaufman v Cohen*, 307 AD2d 113, 126 (1st Dept 2003). Such assistance "occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do

³ Spring Creek obtained consent to this donation from the SCA limited partners who own interests in Spring Creek through LP Shopping.

so, thereby enabling the breach to occur . . . [h]owever, the *mere inaction* of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.” *Id.* (emphasis added).

In the SAC, plaintiffs, “acting individually and derivatively,” allege that Spring Creek and six other defendants aided and abetted two breaches of fiduciary duty by Carol: (i) Carol’s alleged failure to make due demand that MGP and SKI (and their affiliates) deliver the General Partners’ refinancing proceeds to Preservation, and (ii) Carol’s alleged failure to direct Preservation to pay plaintiffs their full share. SAC ¶¶ 115, 119, 121.

In particular, plaintiffs allege that:

[Disque], SKI, Spring Creek, DD/SCA, SK/SCA, DD/Shopping and SK/Shopping . . . provided substantial assistance to [Carol] by, among other things: (i) failing and refusing to deliver the MGP/SKI’s Share of Refinancing Proceeds to Preservation, (ii) transferring, or arranging for the transfer of, part or all of the MGP/SKI’s Share of Refinancing Proceeds to third parties rather than to Preservation, and (iii) using [Disque]’s influence and control over [Carol] to cause her to breach her fiduciary duties to Preservation and to Plaintiffs.

Id., ¶ 121.

In moving for dismissal, Spring Creek argues that plaintiffs fail to state a claim as against Spring Creek because, among other things, plaintiffs fail to identify, as they must, affirmative misconduct that could be attributed to Spring Creek, a third-party transferee. Spring Creek further argues that, to the extent that any affirmative assistance is alleged, that conduct cannot reasonably be attributed to it, as opposed to the group of other defendants in which plaintiffs improperly lump Spring Creek.

In opposition, plaintiffs maintain that they have properly alleged affirmative misconduct

by Spring Creek because the SAC establishes that: (i) Spring Creek “took the cash, shopping center and vacant parcels,” and, subsequently, (ii) transferred the vacant land parcels to a charitable organization in exchange for valuable tax deductions. *See* plaintiffs’ opposition memorandum of law, at 10-13. This argument falls short.

The first category of substantial assistance alleged by plaintiffs is that defendants “fail[ed] and refus[ed]” to deliver proceeds to Preservation (SAC ¶ 121). With respect to the initial transfer made by SCA, the paragraphs relied on by plaintiffs do not describe any affirmative conduct by Spring Creek in connection with its role as a transferee. Regardless of how plaintiffs choose to characterize the part played by Spring Creek, Spring Creek simply received assets. Accepting assets that are transferred, even wrongfully, does not amount to active misconduct by the recipient. *See e.g. Albion Alliance Mezzanine Fund v State Street Bank and Trust Co.*, 8 Misc 3d 264, 271 (NY Sup, New York County 2003, Cahn, J.), *affd* 2 AD3d 162 (1st Dept 2003) (“bank’s *mere acceptance* of a loan repayment despite knowledge of the debtor’s wrongful conduct does not rise to the level of aiding and abetting”) (emphasis added). Further, the SAC does not allege that Spring Creek owed a fiduciary duty to Preservation. Hence, this allegation cannot provide a basis for an aiding and abetting claim against Spring Creek.

The second category of substantial assistance alleged by plaintiffs – that defendants “transfer[ed], or arrang[ed] for the transfer of, part or all of the MGP/SKI’s Share of Refinancing Proceeds to third parties rather than to Preservation” (SAC ¶ 121) – consists of alleged affirmative conduct that cannot, on its face, be attributed to Spring Creek. That is because, throughout the SAC, plaintiffs describe Spring Creek as a special purpose entity that was set up to receive and hold certain of the Refinancing Proceeds. Significantly, the SAC does not allege

that Spring Creek itself engaged in any affirmative misconduct with respect to SCA's transfer of Refinancing Proceeds.

Moreover, with respect to the allegations that touch upon the transfer of the vacant land parcels from Spring Creek to a charitable entity (SAC ¶¶ 103, 107-08), these allegations are too attenuated from the primary wrongs alleged, i.e., Carol's breaches of fiduciary duty, to give rise to an inference of substantial assistance. At the point that Spring Creek transferred the vacant land parcels, the harm to plaintiffs had already occurred. Spring Creek's subsequent transfer did not alienate or otherwise diminish the MGP/SKI economic interest in Spring Creek, it only altered the nature of the asset underlying that interest. Indeed, the SAC does not seek the MGP/SKI's economic interest in the vacant land held by Spring Creek, as they did in their original complaint (Doc. no. 1, ¶ 75[v]), but rather asks for MGP/SKI's economic interest in the tax deductions held by Spring Creek.

The third category of substantial assistance identified by plaintiffs, i.e., that defendants "us[ed] [Disque]'s influence and control over [his wife] Carol to cause her to breach her fiduciary duties to Preservation and to Plaintiffs" (SAC ¶ 121), is patently insufficient to state a claim for aiding and abetting against Spring Creek. The SAC alleges no facts indicating how Spring Creek, as opposed to the other defendants in which it is collectively grouped, might have used Disque's influence to control Carol. This lack of particularity requires dismissal. *See Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 (1st Dept 1981) (dismissing claims, including breach of fiduciary duty, on ground that "the first four causes of action are pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant"); *see also Mediaposure Ltd. (Cayman) v*

OmniReliant Holdings, Inc., 29 Misc 3d 1215(A), 2010 NY Slip Op 51835(U), *9 (Sup Ct, New York County 2010, Fried, J.) (dismissing claim for aiding and abetting breach of fiduciary duty because it was “not sufficiently particularized as to the roles played by each of the individual defendants”); *Rand Int’l Leisure Prods., Inc. v Bruno*, 22 Misc 3d 1111(A), 2009 NY Slip Op 50085(U), *3-4 (Sup Ct, Nassau County 2009) (dismissing claim for aiding and abetting breach of fiduciary duty because plaintiff “has not particularized what [defendant] did, and how, in particular, it substantially assisted [the primary violator]’s ... breach of loyalty”).

In sum, plaintiffs have failed to allege any affirmative conduct by Spring Creek that substantially assisted the alleged breaches of fiduciary duty by Carol. Consequently, aiding and abetting breach of fiduciary duty as against Spring Creek, is dismissed.⁴

B. Conversion (6th COA)

In support of this derivative claim, plaintiffs allege that: (i) “[a]s a result of the Omnibus Assignments, Preservation is the rightful owner of the Assigned Interests”; (ii) “[defendants] have exercised unauthorized dominion over the Due Distributions by failing and refusing to deliver them to Preservation”; and (iii) “[t]he Due Distributions are specific and identifiable.” SAC ¶ 149-51. “Due Distributions” are defined, generally, in the SAC as “the payments made, or that should have been made to Preservation, and that Preservation was obligated to distribute to its members.” *Id.*, ¶ 89.

To properly plead a cause of action for conversion, a plaintiff “must show legal

⁴ Because this defect is a sufficient reason to dismiss this claim, the court need not address Spring Creek’s additional arguments, including that plaintiffs have improperly combined individual and derivative claims. See *Barbour v Knecht*, 296 AD2d 218, 228 (1st Dept 2002) (“The mingling of derivative claims and individual claims requires dismissal of the causes of action so affected.”).

ownership or an immediate superior right of possession to specifically identifiable property, and must demonstrate that the defendant exercised unauthorized dominion over that property to the exclusion of the plaintiff's rights." *NY Medscan, LLC v JC-Duggan Inc.*, 40 AD3d 536, 537 (1st Dept 2007).

Here, plaintiffs cannot establish a possessory property right underlying their conversion claim, as a matter of law. Plaintiffs acknowledge that, "the essence of Preservation's conversion claim is that Preservation obtained an ownership interest in the assets of Starrett City via the Omnibus Assignments" Plaintiffs' opposition memorandum of law, at 18. Plaintiffs' assertion that, as a result of the assignments, Preservation had an existing ownership interest in specific and identifiable *assets*, evidenced by its being identified as a limited partner of SCA (plaintiffs' opposition memorandum of law, at 18-21), reveals a fundamental misunderstanding of what was actually assigned by the general partners of SCA.

The law governing New York limited partnerships expressly provides that neither limited nor general partners can hold an interest in specific property of the partnership. *See Reiter v Greenberg*, 21 NY2d 388, 391(1968) (holding that individuals who contribute to limited partnership acquire no title to real property which is acquired by partnership; they merely acquire pro rata share in partnership profits and surplus, which is personalty); *Executive House Realty v Hagen*, 108 Misc 2d 986, 991(NY Sup, Queens County 1981) ("A general partner's interest in a general or limited partnership is his share of the profits and surplus and it is personalty") (*citing* Partnership Law §§ 52, 98[1]).⁵ Consequently, the assigned economic interests did not give

⁵ This is no less true for limited partnerships formed after July 1, 1991, or otherwise subject to the Revised Limited Partnership Act. *See* Revised Limited Partnership Act §121-701 ("An interest in a limited partnership is personal property and a partner has no interest in specific

plaintiffs a possessory right in the underlying assets because the assignors never had any such right themselves.

C. *Declaratory Judgment (10th COA)*

Plaintiffs allege that, because Disque's and SKI's economic interests as general partners of SCA were assigned to Preservation by the Omnibus Assignments, "the subsequent purported assignments of such interests to third parties are void and unenforceable." Consequently, plaintiffs seek judicial declarations that: (1) the transfers or assignments were "ineffective to the extent that they purport to transfer the MGP's or SKI's economic interests [in SCA]" and (2) Preservation is entitled to receive its share of the transferred assets and economic interests – 19.9%, as provided in the Omnibus Assignments. SAC ¶¶ 172-80.

Pursuant to CPLR 3001, the Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether further relief is or could be claimed. However, declaratory relief is unnecessary and inappropriate where the plaintiff has an adequate alternative remedy in an action for breach of contract. *Morgenthau v Erlbaum*, 59 NY2d 143, 148 (1983) (court may exercise its discretion in not affording declaratory relief when other remedies are available and adequate); *see also Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1988) (affirming dismissal of declaratory judgment claims where plaintiffs "merely seek a declaration of the same rights and obligations as will be determined under the [breach of contract] causes of action" and explaining, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another partnership property.").

form of action, such as breach of contract.”); *Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 (1st Dept 2006) (same).

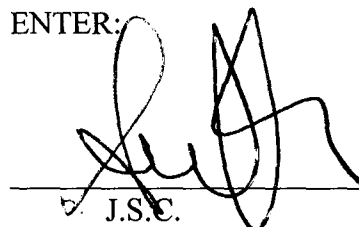
In moving for dismissal, Spring Creek argues that the declaration sought by plaintiffs addresses the same rights and obligations that are addressed in their breach of contract claims, i.e., whether the assignments to third parties, including Spring Creek, are a breach of the Omnibus Assignments and, if so, what portion of those assigned assets (or its equivalent value) must be turned over to Preservation. In opposition, plaintiffs contend that resolution of the contract claims will not directly affect Spring Creek, because Spring Creek is not a party to the Omnibus Assignments or the Preservation Agreement. In making this point, plaintiffs observe, and the court agrees, that the authority relied on by Spring Creek is distinguishable from the instant case, because the declaratory judgment claims found to be duplicative of the contract claims in those cases were asserted against the contracting parties. Thus, it cannot be said that plaintiffs’ resort to declaratory judgment is unnecessary and inappropriate. Accordingly, it is

ORDERED that the motion of defendant Spring Creek Plaza LLC to dismiss the second amended complaint herein is granted to the extent that the Second and Sixth Causes of Action are dismissed as against said defendant and denied as to the Tenth Cause of Action seeking a declaratory judgment; and it is further

ORDERED, that defendant Spring Creek Plaza LLC is directed to serve an Answer within 20 days after service of a copy of this order with notice of entry.

Dated: May 23, 2012

ENTER:



J.S.C.